In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1021

CARPENTERS 46 COUNTY CONFERENCE BOARD, ET AL., PETITIONERS

v.

THE CONSTRUCTION INDUSTRY STABILIZATION COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On October 25, 1973, petitioners filed this suit in the United States District Court for the Northern District of California against the Construction Industry Stabilization Committee, a tri-party agency made up of industry, labor, and public members, that was created under the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743 and 87 Stat. 27, to stabilize wages and prices in the construction industry (see Pet. App. A 2-3; Pet. App. B 48-49, n. 3). The suit challenged the Committee's disapproval of the major portion of a wage increase that petitioners were to have received beginning in June 1973 under a 1971 collective bargaining agreement. The Act expired on April 30, 1974, while the suit was pending in the district court (Pet. App. E 59-60).

On April 22, 1975, the district court, in a memorandum order (Pet. App. A), decided all issues in favor of the Committee, except for a "procedural due process issue," which it certified to the Temporary Emergency Court of Appeals under Section 211(c) of the Act, as amended, 85 Stat. 749.

On July 31, 1975, the court of appeals held that the case was moot and remanded with directions to dismiss (Pet. App. B). Petitioners did not seek review of that judgment.

On September 23, 1975, the district court dismissed the action in accordance with the court of appeals' mandate (Pet. App. C). Petitioner appealed from the order of dismissal, and on December 22, 1975, the court of appeals affirmed, noting that its prior "decision is controlling here" (Pet. App. D 57).

1. In form, petitioners seek review of the court of appeals' second judgment of December 22, 1975, affirming the district court's dismissal of petitioners' suit. But the only issue properly before or actually considered by the court of appeals when it entered that judgment was whether the district court had complied with its earlier mandate (see Pet. App. D). That narrow issue does not warrant review by this Court.

2. In substance, petitioners challenge the correctness of the court of appeals' first judgment of July 31, 1975. But petitioners' effort to obtain review of that judgment is untimely. Under Section 211(g) of the Economic Stabilization Act, as amended, 85 Stat. 750, the time within which to petition for review of that judgment expired on August 30, 1975. The petition for a writ of certiorari, however, was not filed until January 19, 1976.

BLEED THROUGH

Petitioners' time for seeking review of the judgment of July 31, 1975, was not extended or enlarged by the subsequent proceedings. The court of appeals' second judgment, affirming the directed dismissal of petitioners' suit, did not afford petitioners a renewed opportunity to petition for review of the first judgment. The earlier judgment had left nothing further to be decided by the district court: "nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed." *Department of Banking* v. *Pink*, 317 U.S. 264, 267. Since the court of appeals, in affirming the order of dismissal that it had directed the district court to enter, "did no more by the second judgment than to restate what it had decided by the first one" (*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20), the statutory period within which to challenge the correctness of the first judgment must be measured from the date that judgment was entered.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.